

Legal Briefing

Where the decision did not explain why a set off defence had been rejected, had the adjudicator failed to exhaust his jurisdiction?

DC Community Partnerships Ltd v Renfrewshire Council
[2017] CSOH 1432

Opinion of Lord Doherty
In the Outer House, Court of Session
Opinion delivered 22 November 2017

The facts

During April 2014 the council engaged DC to construct a new school at Linwood in Scotland. Towards the end of the works the project manager issued payment certificate no.33 which assessed the amount due as £287,075.07. The council did not serve a payless notice and paid this amount as the notified sum. In June 2017 DC commenced adjudication seeking a revised valuation of payment certificate no. 33. In its final written submission in the adjudication, the council for the first time claimed a right to set off delay damages of £468,666.00 against any further sum awarded to DC over and above the figure in payment certificate no. 33.

The adjudicator decided that DC was entitled to a further sum of £820,425.76. The decision included a paragraph confirming that all of the submissions had been considered but that not all of the material provided had been referred to. Although the adjudicator also included a statement confirming that the council's claims were rejected, the decision did not make any express reference to the council's delay damages set-off defence.

In DC's enforcement proceedings the council contended that having failed to address the set-off defence the adjudicator had not exhausted his jurisdiction: where the adjudicator was required to give reasons for his decision it was not enough to rely upon the general statements that he had considered all of the submissions and that all of the council's claims were rejected. The council submitted that the failure to reference a set-off defence worth over 50% of the further sum awarded was a material omission in a single dispute adjudication that could not be severed. Finally, the council submitted that a set-off defence was available notwithstanding the absence of a

payless notice because delay damages were claimed against the further sum awarded, not the amount assessed by the project manager in payment certificate no. 33 (that the council had paid in full).

The issue

Could the adjudicator's decision be enforced or enforced if severed?

The decision

The judge said it was well established that the reasons given in a decision need not be elaborate or deal with every argument. However the judge considered that as a minimum, an adjudicator was required to give at least some brief intelligible explanation of his/her thinking. The judge found that the general statements in the decision fell far short of showing that the council's set-off defence had been considered. Neither could it be said that the rejection of the set off-defence was implicit in or a corollary of the adjudicator's reasoning that did appear in the decision. Given the value of the set-off claim, the judge considered the adjudicator's omission was material.

The judge also agreed with the council that under the HGCRA the notified sum could not be construed as meaning the amount specified in the payment notice or such other amount as an adjudicator might eventually decide was due. Here, the further sum awarded by the adjudicator was not part of the notified sum identified in payment certificate no. 33. Therefore the council's right to apply a set-off was not conditional upon a payless notice having been previously issued.

Finally, the judge thought it would not be appropriate or practical to adopt DC's last minute proposal to enforce payment of the further sum awarded by the adjudicator less the amount claimed by way of delay damages.

Commentary

As a matter of best practice adjudicators should be including in their decisions a comprehensible and if necessary, concise explanation of their conclusions in relation to the main elements of the dispute. As in this case, absent an explanation a default statement which casually asserts that all submissions have been considered may not be sufficient if reasons are required (which is the case in most adjudications).

Where it was common ground that this was a single issue dispute i.e. the valuation of payment certificate no. 33 the judge

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noted that severance would create obvious practical difficulties, for example in terms of dealing with interest, adjudicator's fees and costs. The judge also thought DC's last minute proposal to accept judgment for the sum awarded subject to deduction of the delay damages would have required the court to enforce a modified rather than a severed decision. The judge rejected this approach as creating a real risk that the court would be innovating upon the terms of the contract agreed by the parties.

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